

220 CMR: DEPARTMENT OF PUBLIC UTILITIES

220 CMR 99.00: PROCEDURES FOR THE DETERMINATION AND ENFORCEMENT OF VIOLATIONS OF M.G.L. c. 82, § 40 ("DIG SAFE")

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99.01: Purpose And Scope

(1) 220 CMR 99.00 defines terms and delineates the duties of those subject to M.G.L. c. 82, §§ 40 through 40E, also known as the "Dig Safe" law. It also establishes the procedures for determining the nature and extent of violations of M.G.L. c. 82, §§ 40 through 40E and the procedures for issuance of a notice of probable violation, a remedial order or a consent order with respect to such violations. In addition, 220 CMR 99.00 sets forth the standards used to determine the amount of civil penalties to be imposed.

(2) Every gas, electric and telephone company, municipal gas or electric department, natural gas pipeline company, petroleum or petroleum products pipeline company, private water company and cable television company shall report all suspected violations of M.G.L. c. 82, §§ 40 through 40E, to the Department of Public Utilities (Department) within 30 days of learning of the circumstances constituting the suspected violation. Any other person may report a suspected violation of M.G.L. c. 82, §§ 40 through 40E, to the Department. All such reports shall be in a form deemed appropriate and necessary by the Department.

99.02: Definitions

Center Line Method shall mean the method for identifying the location of an underground facility by placing marks on the surface above and parallel to the center line of the facility.

Company shall mean natural gas pipeline company, petroleum or petroleum products pipeline company, public utility company, cable television company, and municipal utility company or department that supply gas, electricity, telephone, communication or cable television services or private water companies within the city or town where such excavation is to be made.

Description of Excavation Location shall include: the name of the city or town where the excavation will take place; and the name of the street, way, or route number where appropriate; and the name of the streets at the nearest intersection to the excavation; and the number of the buildings closest to the excavation; and/or any other description which will accurately define the excavation location, including landmarks and utility pole numbers; and the date and location of any blasting.

Emergency shall mean a condition in which the safety of the public is in imminent danger, such as a threat to life or health or where immediate correction is required to maintain, or restore essential public utility service.

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Excavation shall mean an operation for the purpose of movement or removal of earth, rock or the materials in the ground, including but not limited to, digging, blasting, augering, backfilling, test boring, drilling, pile driving, grading, plowing in, hammering, pulling in, jacking in, trenching, tunneling and demolition of structures, excluding excavation by tools manipulated only by human power for gardening purposes and use of blasting for quarrying purposes.

Excavator shall mean any entity including, but not limited to, a person, partnership, joint venture, trust, corporation, association, public utility, company or state or local government body which performs excavation operations.

Facility shall mean something that is built, constructed, installed or established to perform some particular function or to serve or facilitate some particular end.

Person shall mean any individual, firm, joint venture, partnership corporation, cooperative association, or joint stock association, and includes any trustee, receiver, assignee, or personal representative thereof.

Premark shall mean to delineate the general scope of the excavation or boring on the paved surface of the ground using white paint, or stakes or other suitable white marking on nonpaved surfaces.

Safety Zone shall mean a zone containing the width of the facilities plus not more than 18 inches on each side and designated on the surface by the use of standard color-coded markings.

Standard Color-coded Markings shall mean the following colored code which shall be used for the placement of marks:

- (a) Red - electric power lines, cables, conduit or light cables;
- (b) Yellow - gas, oil, petroleum, steam or other gaseous materials;
- (c) Orange - communications cables or conduit, alarm or signal lines;
- (d) Blue - water, irrigation and slurry lines;
- (e) Green - sewer and drain lines;
- (f) White - premark of proposed excavation.

System shall mean the underground plant damage prevention system as defined in M.G.L. c. 164, § 76D.

99.03: Premarking

- (1) Premarking shall occur before an excavator has given notice of excavation to the system.
- (2) When premarking in an area where white marks may interfere with traffic or pedestrian control, or when white marks might otherwise be difficult to see, the excavator should consider using an alternate color, other than a color listed as a standard color code marking under 220 CMR 99.02, and must inform the Dig Safe Center in the notice that an alternate color has been used.
- (3) When excavating to replace a guardrail or fence, an excavator may use the pre-existing guardrail or fence as the premark. If the new guardrail is not collinear with the pre-existing guardrail or fence, the excavator must premark only that area to be excavated that will differ from the pre-existing guardrail or fence.

99.04: Excavation Notification

- (1) Notice of a excavation shall be tendered to the system at least 72 hours, exclusive of Saturdays, Sundays or holidays, but not more than 30 days prior to the commencement of an excavation. Such notice shall include a description of the excavation location and the date the excavation is expected to begin.

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- (2) In an emergency, the excavator may commence excavating after having taken all reasonable steps, consistent with the emergency, to notify the system and premark the excavation site.
- (3) Each company shall establish standard operating procedures to identify the location of its respective underground facilities as soon as practicable after receiving notification of an emergency excavation whether or not the excavation has begun.
- (4) Circumstances requiring emergency excavation shall not excuse the excavator from the requirement to use all reasonable means to avoid damage to an underground facility.
- (5) Emergency Dig Safe markings are invalid after the cessation of the emergency. Further excavation at the location shall require notice as set forth in 220 CMR 99.04(1) and premarking.
- (6) In no event shall any excavation by blasting take place unless notice thereof, either in the initial notice or a subsequent notice accurately specifying the date and location of such blasting, shall have been given and received at least 72 hours in advance, except in the case of an unanticipated obstruction requiring blasting when such notice shall be not less than four hours prior to such blasting. If any such notice cannot be given as aforesaid because of an emergency requiring blasting, it shall be given as soon as may be practicable but before any explosives are discharged.

99.05: Marking Procedures

- (1) Every company shall use the center line method to identify the location of its respective underground facilities. The underground facility shall be completely located within a safety zone no more than 18 inches plus the width of the facility from the designated center line.
- (2) All markings shall indicate, where practicable, the width, if it is greater than two inches, and material of the underground facility, as well as any change in direction and any terminus points of the facility.
- (3) Marking shall extend at least 15 feet beyond the boundaries of the premarked area.
- (4) Within 72 hours, exclusive of Saturdays, Sundays and legal holidays, from the time initial notice is received by the system or at such time as the company and excavator agree, every company shall mark the location of an underground facility by applying a visible fluid, such as paint, on the ground above the facility. The company may use an alternative marking method of color-coded stakes, color-coded flags or color-coded brush-type markers.
- (5) In a paved area designated as a historical location, a company may use chalk, stakes, flags, brush-type markers or other suitable devices with the appropriate color-coding affixed or attached, instead of marking fluid.
- (6) The color code listed under 220 CMR 99.02 shall be used for the placement of marks whether by visible fluid or alternative marking methods.
- (7) If the surface above the underground facility is to be removed, the company may place supplemental offset marks. These marks must be uniformly aligned and must indicate the specific distance from the markings to the underground facility.
- (8) After a company has marked the location of its facilities, the excavator shall be responsible for maintaining the markings at such locations unless such excavator, after premarking, requests remarking at the location due to the obliteration, destruction or other removal of such markings. The company shall then remark such location within 24 hours following receipt of such request.
- (9) Markings shall be valid for an excavation site until one of the following events occurs:
 - (a) the excavation does not commence within 30 days of the notification;
 - (b) the markings become faded, illegible or destroyed;

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- (c) a company installs new underground facilities in a marked area still under excavation; and/or
- (d) an emergency condition is brought to conclusion which nullifies any markings installed during the emergency.

99.06: Excavation

(1) When excavating in close proximity to the underground facilities of any company, non-mechanical means shall be employed, as necessary, to avoid damage in locating such facility, and any further excavation shall be performed employing reasonable precautions to avoid damage to any underground facilities including, but not limited to, any substantial weakening of structural or lateral support of such facilities, penetration or destruction of any pipe, main, wire or conduit or the protective coating thereof, or damage to any pipe, main, wire or conduit. In such cases, mechanical means may only be used for the initial penetration of pavement, rock or other such materials, so long as non-mechanical means are employed after the paving, rock or other such material has been penetrated.

(2) If an excavator damages a company's underground facility, or has reason to believe that a company's underground facility may be damaged or compromised in any way as a result of the excavator's actions, the excavator must notify the company as soon as possible.

99.07: Notice of Probable Violation: Commencement of Enforcement Proceedings

(1) The Department may begin a proceeding by issuing a notice of probable violation (NOPV) if the Department has reason to believe that a violation of M.G.L. c. 82, §§ 40 through 40E, has occurred or is occurring. The NOPV shall be issued by the Commission or its designee. The NOPV shall state the factual basis for the allegation of a violation and the amount of the civil penalty which may be assessed against the person served (respondent) if the Department finds that the violation has occurred. The NOPV shall state that the respondent has a right to reply in writing to the NOPV or to appear at an informal conference with the Department on a designated day which is at least 21 days from the date of the NOPV.

(2) Any written reply must be filed with the Department on or before the day scheduled for the informal conference and must be signed by the respondent or the respondent's designee. It must include a complete statement of all relevant facts and authority, and full description of the reasons that the respondent disputes the violation alleged in the NOPV.

(3) If the respondent or the respondent's representative fails, without good cause, either to file a written reply or to appear at the informal conference, the respondent shall be deemed to have admitted the accuracy of the factual allegations and legal conclusions stated in the NOPV, and the respondent shall be held liable to pay the civil penalty designated in the NOPV through the issuance of a remedial order pursuant to 220 CMR 99.10.

99.08: Informal Review

(1) An informal review shall be conducted by an investigator designated by the Commission. The informal review shall consist of an informal conference, if the respondent has chosen this option under 220 CMR 99.07, or an analysis of the respondent's written reply.

(2) At the informal conference, the respondent shall have the right to be represented by an attorney or other person, and shall have the right to present relevant documents to the investigator. The investigator shall make available to the respondent any evidence which indicates that the respondent may have violated M.G.L. c. 82, §§ 40 through 40E, and the respondent or the respondent's representative shall have the opportunity to rebut this evidence. However, this informal conference shall not be construed to be an adjudicatory proceeding as defined in M.G.L. c. 30A.

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(3) The investigator shall make a decision in writing, which will be sent to the respondent by mail, return receipt requested. If the respondent is not satisfied with the decision, the respondent may request an adjudicatory hearing, provided that such request is made in writing within ten days of the date of receipt of the decision. Failure to request an adjudicatory hearing will be deemed an admission of the factual allegations and legal conclusions stated in the investigator's decision, and the respondent shall be held liable to pay the civil penalty designated in the investigator's decision through the issuance of a remedial order under 220 CMR 99.10.

99.09: Adjudicatory Hearing

(1) The adjudicatory hearing shall be a de novo hearing and shall be an adjudicatory proceeding as defined in M.G.L. c. 30A, and conducted pursuant to 220 CMR 1.00: Procedural Rules.

(2) At the adjudicatory hearing, the respondent shall have the right to be represented by an attorney or other person.

(3) If the Department finds, after the adjudicatory hearing, that the respondent has violated M.G.L. c. 82, §§ 40 through 40E, it may issue a remedial order pursuant to 220 CMR 99.10.

(4) If the Division determines, or the Department finds, after the request for an adjudicatory decision has been filed, that the evidence supports a determination that the respondent violated M.G.L. c. 82, §§ 40 through 40E in a respect not stated in the NOPV or decision of the investigator, the Division shall issue an NOPV with respect to the violation so determined or found.

99.10: Remedial Orders

(1) If the Department finds that a violation has occurred or is continuing, it may issue a remedial order. The remedial order shall include a written opinion setting forth the factual and legal basis of the Department's findings and shall direct any party to take any action which is consistent with said party's obligations under M.G.L. c. 82, §§ 40 through 40E, including the payment of a civil penalty as provided by said statute.

(2) A remedial order issued by the Department under 220 CMR 99.10 shall be effective upon issuance, in accordance with its terms, unless stayed, suspended, modified or rescinded.

(3) A remedial order is a final decision of the Department within the meaning of M.G.L. c. 25, § 5, and thereby subject to review by the Supreme Judicial Court.

(4) If the respondent fails either to appeal a remedial order to the Supreme Judicial Court or to comply fully with the order within 20 days, the Department may refer the case to the Attorney General with a request that an action be brought in the Superior Court to seek appropriate relief, including, but not limited to, collection of assessed penalties.

99.11: Consent Orders

(1) Notwithstanding any other provision to the contrary, the Department may at any time resolve an outstanding enforcement issue with a consent order. A consent order must be signed by the person to whom it is issued, or a duly authorized representative, and must indicate agreement with the terms therein. A consent order need not constitute an admission by any person that a violation has occurred.

(2) A consent order is a final order of the Department, having the same force and effect as a remedial order issued pursuant to 220 CMR 99.10.

(3) A consent order shall not be appealable by the respondent and shall include an express waiver of appeal or judicial review rights that might otherwise attach to a final order of the Department.

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99.12: Civil Penalties

(1) Any person, contractor, excavator or company found by the Department to have violated any provision of the Dig Safe law or regulation adopted by the Department shall be subject to a civil penalty not to exceed \$ 1,000 for the first offense and not less than \$ 5,000 nor more than \$ 10,000 for any subsequent offense. On a subsequent offense, if a respondent demonstrates a period of 12 consecutive months within which the Department has not found the respondent in violation of the Dig Safe law, the Department shall cite respondent the first offense civil penalty of \$ 1,000.

(2) In determining the amount of the civil penalty, the Department shall consider the nature, circumstances and gravity of the violation; the degree of the respondent's culpability; the respondent's history of prior offenses; and the respondent's level of cooperation with the requirements of 220 CMR 99.00.

REGULATORY AUTHORITY

220 CMR 99.00: M.G.L. c. 82, § 40 through 40E; c. 164, §§66,76,76C and 76D